

Testimony before the Legislative Committee on Gaming Policy

April 25, 2023, Hearing Room E

My name is Craig Dorsay. I have been tribal attorney for the Confederated Tribes of Siletz Indians since 1989, and have been directly involved with all of the Siletz Tribe's gaming efforts since that time.

I watched the informational presentation by Danny Santos before this Committee on March 21, 2023. While I have known Danny for probably 25 years and consider him a friend, his presentation to you contained a number of incorrect statements and misinformation that must be corrected so the Committee has accurate information. I have also reviewed the March 16, 2023 letter to the Committee from the Cow Creek and Grand Ronde Tribes, which also contains serious misinformation.

1. First and foremost, Danny testified that every Class III IGRA Gaming Compact in Oregon contains a "One Casino" provision, and that every Oregon tribe voluntarily agreed to this condition. This statement is false. The Siletz Tribe has never agreed to a "One Casino Per Tribe" Policy and has said so consistently over the years. The Siletz Tribe's Class III Gaming Compact with the State, entered into on September 14, 1999, and approved by the Bureau of Indian Affairs on November 12, 1999, states at Section 13.A:

A. Gaming at Another Location or Facility. The Tribe hereby waives any right it may have under IGRA to negotiate a Compact for Class III gaming at any other location or facility for a period of five (5) years from the effective date of this Compact, *provided*, that if any other Oregon Indian tribe operates Class III gaming at more than one location under a Compact with the State, the Tribe shall have the right to request immediate negotiations on the issues, *and provided further*, that the Tribe shall have the right to negotiate for Class III gaming at another location if some natural occurrence makes the Gaming Location unusable for a Gaming Facility.

This provision expressly authorized the Siletz Tribe to negotiate for a second casino five years after the Compact date, and includes two provisos that would allow the Tribe to negotiate for another Casino earlier than the

five years. Danny's statement that every Tribe's Gaming Compact has a one casino provision is wrong. I have submitted to the Committee the language from every Oregon-based Tribe's Class III Gaming Compacts on their Compact provisions addressing additional gaming locations. Four tribes have this authorization in their Compacts, four tribes have a restriction to one casino in their Compacts, including Grand Ronde and Cow Creek. One Tribe has a hybrid provision. Each Tribe is a separate sovereign and exercises its own sovereignty. While Cow Creek and Grand Ronde are free to agree to restrict their gaming to one casino, they are not free to impose their position on other tribal sovereigns.

If the Governor refused to negotiate a second gaming location for Siletz under its Compact, this would be a contractual violation of the Siletz Tribe's Gaming Compact and an expression of bad faith that is prohibited by IGRA.

2. The Cow Creek and Grand Ronde Tribes' letter includes statements from then Governor Kitzhaber in 1997 stating that he was going to insist on a one-casino per tribe provision in all subsequent Tribal Gaming Compacts. This statement is the supposed genesis of the Oregon Governor's "One Gaming Facility Per Tribe" Policy. However, those two tribes fail to mention in their letter that it was Governor Kitzhaber who negotiated a Tribal Gaming Compact with the Siletz Tribe in September 1999 expressly authorizing Siletz to negotiate for a second Casino location after 5 years. (As an additional note, I saw on the Committee's website copies of all the Tribal Gaming Compacts in Oregon. The Siletz Tribe's Compact shows a 1995 date. This Compact is no longer in existence. The Siletz Tribe's 1999 Compact replaced it. I have provided the correct Compact in my materials; you should replace the wrong one.).
3. The Committee should also take a closer look at Governor's 1997 White Paper on Gaming in Oregon, which you have in your Committee materials. While this paper recommended a tribal gaming policy of one casino per tribe, it also recommended a halt on the expansion of State lottery gaming. In the Section entitled "Policy Directions: State-run Lottery," Governor Kitzhaber recommended that the expansion of the Oregon Lottery be halted by "prohibiting video line games and imposing a freeze on the number of Lottery machines" be imposed

until the State and retail establishments reduced its dependence on Lottery revenues. We know how well that recommendation played out. In 1997 the Lottery earned \$350 million per year and there were 7823 Lottery VLTs. Line games were soon introduced into the Lottery and Lottery revenues in 2022 were \$968 million (\$1.1 billion in 2019), and the Lottery now operates over 12,000 machines (exact numbers are hard to find online). So Lottery revenues and machines have more than doubled since Kitzhaber's policy paper, while tribal gaming has been flat. Governors Kitzhaber's and Kotek's statement that they are against any expansion of gaming in the State – tribal or state – is disingenuous and hypocritical at best. The Siletz Tribe wants the same deal its chief competitor – the Oregon Lottery – got.

4. The federal Indian Gaming Regulatory Act – IGRA – does not contain any language or provision limiting the number of gaming locations a tribe can have or negotiate for. It is not one of subjects that IGRA sets out as within the proper scope of compact negotiation at §2710(d)(3)(C). Many tribes in other States have more than one gaming location. The Governor of California just approved new compacts with two tribes in that State expressly authorizing each tribe to have two casinos. No other State I am aware of has attempted to restrict tribes to one gaming location.
5. I want to emphasize one point made by Danny in his presentation. He acknowledged that this alleged "One Casino per Tribe" policy isn't written anywhere and has never been formally adopted under State law. As this Committee noted in its final report in the last Legislative Session, no formal "One Casino Per Tribe" State Policy exists.

What constitutes the State of Oregon's official gaming policy was declared expressly by the State and Governor Kitzhaber in the Siletz Tribe's current Tribal Gaming Compact: "**AND WHEREAS**, the public policy of the State is reflected in the Constitution, statutes and administrative rules of the State." This language is contractually binding on the State. As this language states and as undisputed constitutional separation of powers case law declares, it is the State Legislature that makes policy, not the Governor; the Governor

implements State policy developed by the Legislature. The Oregon Legislature has adopted no policy on how many tribal casinos should be allowed. Governor Kotek's asserted one casino per tribe policy appears nowhere in the Oregon Constitution, statutes or administrative rules. It is not binding legal policy under Oregon or federal law. The law is beyond dispute that it is this Legislature that has the constitutional authority to make and declare policy, not the Governor. Grand Ronde and Cow Creek's March 16 letter contains a number of quotes from previous Oregon Governors and others about Oregon's supposed one-casino per tribe "policy;" no such statutory or formal policy exists, and the Governor lacks legal authority to establish such a policy on his or her own without the Legislature first doing so.

6. The only express State policy on tribal gaming that exists is the statutory authority under ORS 190.110(3) for the Governor to enter into agreements with tribes "to ensure that the state will not interfere with or infringe on the exercise of any right or privilege of a tribe held or exercised under any treaty, statute, policy or any other authority." In *Dewberry v. Kulongoski*, 406 F.Supp.2d 1136, 1155 (D .Or. 2005), the federal court upheld the Governor's authority to negotiate gaming compacts with tribes but declared that this authority must be exercised in good faith to ensure that the State "does not interfere with tribal gaming rights protected by federal law." Restricting tribes to one casino when IGRA imposes no such restriction is not protecting tribal gaming rights under federal law, it is unlawfully restricting those rights, and the Governor's asserted one casino per tribe policy is not valid under the law.
7. Danny mentioned the Siletz Tribe's previous attempt to conduct gaming in Salem in 1992, but made a number of inaccurate statements. The Siletz Tribe did not own the Salem Property in trust in 1992; it had applied to take that land in trust for gaming under IGRA as its only gaming location. The Secretary of Interior at the time, Manuel Lujan, made the two-part determination that the proposed gaming operation was **a.** in the best interest of the Siletz Tribe, and **b.** would not be detrimental to the surrounding community. Governor Roberts, who initially told Siletz she supported the Siletz Tribe's proposal,

changed her mind and refused to concur in the Secretary's determination without giving any reason. Danny said Governor Roberts reached different findings than the Interior Secretary. This statement is not correct. Governor Roberts did not state any reasons for rejecting the Siletz Tribe's proposal; she just said no, apparently for political reasons. Danny stated that her decision was also based on the "One Casino Per Tribe" policy. This statement cannot be true. The Siletz Tribe had no casino in 1992 and no land anywhere where it could build a casino – its reservation was 36 scattered parcels of ex-BLM timber land high in the Coast Range, a cemetery and Pow Wow grounds.

8. One committee member asked Danny last week whether the Legislature could be more involved in the Compact approval process. and Danny dismissed the idea, stating that it would be impractical for the 90 members of the Oregon Legislature to negotiate a gaming compact. Danny did not provide you with complete information on this issue. A number of courts in different states have confirmed that it is the Legislature that has ultimate authority over Indian gaming policy because such compacts authorize gaming not expressly allowed under state law, and only the Legislature can delegate some of its authority to the Executive Branch in specific language. Several States have enacted a workable "hybrid" policy. Washington State, for example, delegates negotiation of a tribal gaming compact to the State's Gambling Commission. Once finished, the draft Compact is submitted to a specific Legislative Committee, which reviews, holds public hearings, and can amend the draft Compact. Once the amended Compact has been considered and approved by the relevant Tribe, it comes back to the Committee for approval. Once approved by the Committee, the Compact goes to the Governor for execution. This is a workable way to involve a Legislature in the Tribal Gaming Compact process. New Mexico has a comparable process. The Siletz Tribe encourages the Oregon Legislature to look more closely at exercising its policy authority in this area.

9. Finally, I want to clear up some confusion by the Committee and Danny on Class II vs. Class III gaming. A number of incorrect statements were made on this issue last week. First, it is a correct statement that Class II gaming does not require a Compact. Compacts are only required for Class III Gaming. We are mainly talking about slot machines or VLTS when we talk about Class II gaming. Class II VLTs run a bingo game inside the machine, but in terms of the gaming experience for the patron, they are virtually indistinguishable from regular Class III slot machines. Some States like Oklahoma only operate Class II machines. They are for all practical purposes slot machines; patrons cannot tell the difference. The difference in terms of casino operations is that Class II casinos cannot offer other Class III games such as roulette, craps, or house-banked poker.
10. Where the confusion arose last week is when a number of the Committee members, and Danny, all posited that a tribe can operate Class II gaming without a compact if it can acquire land in trust. This was the wrong factor to focus on. IGRA generally prohibits gaming on land acquired in trust after the date IGRA was enacted, Oct. 17, 1988. So the relevant question is really when was the land in question acquired in trust? If land was acquired by a Tribe in trust after 1988, IGRA contains four exceptions to the general prohibition at 25 U.S.C. §2719(b). Three of these exceptions are Mandatory, meaning if a tribe can meet one of the exceptions, they are automatically entitled to engage in gaming on the land, even if it was put into trust after 1988. If a Tribe that met one of these exceptions wants to operate a Class III Casino, it must still negotiate a Compact with the State. The fourth exception is the two-part Secretarial determination with gubernatorial concurrence discussed before. Under this exception, a tribe can engage in gaming on land acquired in trust after 1988, but only if it satisfies the two-part test. It can then negotiate a Class III compact for that site, or engage in Class II gaming without a compact. That is the difference.
11. Siletz and Coquille offer a good example of these differences. Coquille is attempting to acquire land in trust under one of the mandatory exemptions. Acquiring land in trust is a separate discretionary action

from gaming. But if the Coquille Tribe successfully obtains the land in trust, and it qualifies for one of the mandatory IGRA exceptions, it can engage in Class II gaming on that land with no further approval required. The Siletz Tribe, after its unsuccessful two part determination effort in 1992, obtained the Salem land in trust in 2000 for non-gaming purposes. So it doesn't need to put this land in trust. But it does now have to qualify that trust land for gaming under IGRA, which is where the two-part Secretarial determination process comes in.

12. The important point for Siletz is that the State of Oregon has expressly, contractually, agreed in the Siletz Gaming Compact to negotiate for a second gaming location for Siletz. Salem is that location. The Governor cannot use the concurrence provision of IGRA Section 20 to thwart additional gaming by the Siletz Tribe when the State has contractually agreed in the Siletz Compact to allow such additional gaming.

13. I have provided the Committee with some background information on the respective volume of gaming in Oregon by the Lottery and Tribes - \$1.12 billion by the Lottery in 2019 vs. \$537.7 million for the Tribes. But the important point is that the Tribal share of gaming continues to decrease as the revenue of the Lottery continues to increase. Tribes are increasingly being left behind. The State's gaming has been continually increasing while tribal gaming revenue has flattened or decreased. The State Lottery now has over 12,000 VLT slot machines at over 4000 locations throughout the State while tribes are restricted to a few rural locations and only have a total of just over 7000 machines. The State has authorized mobile sports betting throughout the State, and area with huge potential revenue growth, while rejecting the Siletz Tribes' request to add the same type of gaming to its Compact.

14. The One Casino alleged policy is all about competition. Grand Ronde and Cow Creek are only interested in getting the Legislature or Governor to protect their gaming revenues and to further discriminate against the other Oregon tribes. The Governor is protecting and increasing Lottery revenues coming into the State and avoids raising taxes for State services. State Lottery revenues have almost tripled since Kitzhaber first declared a limitation on tribal gaming, while tribal

gaming revenues have remained flat or declined. Tribes are the State's biggest gaming competitor and the State is choking off tribal gaming revenue, and thus revenue the Tribe can use to provide services for its members (and which relieves the State and local government from having to serve those tribal members).

15. I am glad to answer any questions the Committee might have.